SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 615

ARO CORPORATION,

Petitioner,

v.

CARL D. CITRON,

Respondent.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THE PETITION FOR A WRIT OF CERTIORARI

The Petition prays that a writ of certiorari issue to review the judgment of the Court of Appeals reversing the judgment of the District Court and remanding the cause for a new trial.[1]

The "Statement", contained in the Petition, states (Pet. 6) "On appeal the Court [Court of Appeals] reversed the judgment resulting from the jury verdict solely on the ground that the scheduling of trial recesses in the protracted litigation presumptively prejudiced plaintiff's right to due process and to effective trial by jury, . . .". This entirely ignores that portion

1. *Citron v. Aro Corp.*, 377 F.2d 750 (3d Cir. 1967).

of the Opinion of the Court of Appeals which reads as follows (Pet. 18):

> "We are persuaded by *our review of the record as a whole* that the manner in which the trial of this case was conducted was erroneous. However, the question for decision is whether the error may be disregarded as harmless in the absence of an affirmative showing of prejudice. We think not. We believe that the trial was conducted in a manner which in its ultimate effect was distinctly favorable to the defendant and decidedly unfavorable to the plaintiff." 377 F.2d at 753; emphasis added.

The "Statement" also neglects to inform the Court that plaintiff-respondent, when filing his Motion for a New Trial with the District Court, in addition to the points relating to the "prejudice resulting from various trial recesses," also assigned some 59 additional reasons in support of his Motion.[2] Substantially all of the reasons set forth in the Motion were argued in the brief and oral argument to the Court of Appeals.[3]

The "Statement" also states that petitioner-defendant "sought a rehearing from the Court of Appeals asking for a declaration of guidelines for the conduct of further protracted litigation — including the retrial of the instant case — . . .". (Pet. 7) This, of course, was rightfully denied for courts do not give advisory opinions.

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2. See Joint Appendix, Vol. 11, pp. 4530a-45a. The reasons relating to the trial recesses are found in Paragraphs 38(a)-(c) of the Motion. Joint Appendix, Vol. 11, pp. 4539a-40a. The other reasons are found in Paragraphs 1-37, 38(d)-(v) and 39-41 of the Motion.

3. See Brief of Appellant in the Court of Appeals which Brief was certified as a supplement to the Record, previously certified to the Supreme Court, at the request of plaintiff-respondent.

II.

THE ORDER OF THE COURT OF APPEALS

The Order of the Court of Appeals sought to be reviewed is as follows:

"JUDGMENT

"This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

"On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of defendant, filed May 5, 1965, be, and the same is hereby reversed, with costs, and the cause remanded with a direction that a new trial be ordered."

The Supreme Court of the United States has consistently held, since Courts of Appeals were established, that certiorari will not issue to review a judgment of those courts reversing a judgment of the lower court and remanding the cause for new trial, such judgments not being final decisions. *Chicago & N.W.R. Co. v. Osborne,* 146 U.S. 355 (1892).

We recognize that the Court does have authority and has on occasion granted certiorari on interlocutory orders. Our diligent research has failed to disclose any instance where it was granted except where the issue involved was fundamental to further conduct of the case. *Land v. Dollar,* 330 U.S. 731 (1947). It appears abundantly clear that the ordering of a new trial for prejudicial errors in the trial of a case is not such an issue.

Petitioner-defendant does not question the jurisdiction of the Court of Appeals to enter the judgment complained of nor does it contend that there is any issue involved the decision of which is essential to the proper retrial of the case. Nor does it contend that an injustice is done and hence the Court of Appeals abused its discretion in entering the judgment. Its sole complaint is its dislike for the judgment ordering a retrial of this case.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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